No. 15244

United States Court of Appeals

For the Ninth Circuit

JOHNSON LINE, a Corporation, *Appellant,*

vs.

SHAUN MALONEY, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

ZABEL & POTH
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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

A judgment was entered against the appellant on the 12th day of March, 1956, in the District Court for the Western District of Washington, Northern Division (R. 33). The cause giving rise to the judgment was tried before the Honorable Roger T. Foley, sitting without a jury on the civil side of the court.

Prior to entry of the judgment, the district judge prepared his own Opinion, Findings of Fact, and Conclusions of Law (R. 16). Also, prior to the entry of judgment, the defendant below filed its motion for a new trial (R. 29).

After consideration of the grounds asserted for a new trial, the court rendered an additional opinion and Order denying the motion for a new trial (R. 42), which was filed on the 6th day of July, 1956. This appeal has followed.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is conferred by the provisions of Title 28, U.S.C.A. §1332.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this Court is granted by the provisions of Title 28, U.S.C.A., §1291, which gives to the Courts of Appeal jurisdiction of all appeals from final judgments of District Courts.

STATEMENT OF THE CASE

An excellent statement of the case is contained in the Opinion and Findings of Fact which were prepared by the trial judge (R. 16-27). It, therefore, is appropriate that appellee adopt the same together with the court's further Opinion ruling on a new trial (R. 42-46) as its statement of the case.

"Opinion, Findings of Fact and Conclusions of Law (R. 16)

"On the morning of June 28, 1953, plaintiff, Shaun Maloney, in the course of his employment as a stevedore, was ordered along with others to uncover No. 7 hatch of the vessel Golden Gate and to descend to the 'tween-deck and there to discharge cargo from the vessel. He was the first to descend and after taking a step or two from the ladder, plaintiff slipped and fell, thereby injuring the wrist of his right hand, as will hereinafter appear. After the injury he continued his work on the ship.

"Plaintiff received physical therapy treatments from Dr. Smith and was on December 28, 1953, examined by Dr. Bernard Gray, a well-qualified physician and sur-

geon specializing in orthopedic and traumatic surgery. In response to an inquiry as to what his examination disclosed, Dr. Gray testified:

"'He [plaintiff] told me that he had been hurt six months previously on June 28, 1953. He was a longshoreman aboard a vessel and he stated that he slipped on some wheat apparently and in order to catch himself—or, he caught himself on his wrist and in so doing he hyperextended or bent his wrist backward rather forcefully. He said that he had immediate pain and his wrist became very painful and swollen by the next day. He consulted his doctor, Dr. Smith, who put him on treatment at that time.

"'He had no time loss and he states that he favored his wrist for a couple of months and it tended to improve for a while and then got worse. He said he had never hurt his wrist before. He was right handed. At the time I first saw him I noted that as far as examination was concerned, there was ten degrees limitation of motion forward and backward at the wrist. That the grasping power of the hand was weak and there was some swelling at the top of the wrist and the circumference of the wrist was three-eighths of an inch greater than the left. I made some X-rays at the time which revealed nothing significant. I advised that he wear a leather cuff, a so-called Colles cuff, which would immobilize the wrist and take the load off of it. I suggested he come back and see me in about ten days and that was the last I saw of him until a few days ago.'

"In response to the inquiry, 'What did you find on this examination?' Dr. Gray continued:

"'I saw him August 1, 1955. He told me that

after I had seen him he had been seen again by his doctor who immobilized the wrist in plaster for a few weeks and advised surgery to the wrist. He was then sent to Dr. Morris Dirstine who examined him and recommended X-ray treatment and applied the cuff which had been recommended. At that time he was off work for an interval. X-ray treatment did not contribute much to his relief. He had been working since that time, most of the time doing lighter work. At the time I saw him he was driving a bull. [A small truck used to lift loads.] If his work would tend to be heavy he wore his cuff. He had certain residual complaints with reference to the right wrist. He had pain in lifting, especially if the hand was in hyperextension, with the wrist bent backwards. Any exertion caused pain and tended to persist for variable lengths of time. The swelling or lump he had at the back of the right wrist would blow up at times and quieten down at times, but there always was some swelling there and the only relief he could get was if he did not exercise his wrist or if he wore his cuff. At the time I examined him I thought that the range of motion was the same as before. There was some limitation of motion, ten degrees, which can be estimated as equivalent to about fifteen per cent. There was a small ganglion or lump at the back of the right wrist which was tender and which could be made to enlarge by bending the hand down. There was slight weakness of grip in the hand, but this was not marked. There was pain on forced motion of the wrist. This is about the extent of the findings on examination. I took new X-rays which showed no change and nothing significant.

" ' * * *

" 'Oh, I think that he has got a stationary con-

dition, or, the basis of the condition is stationary. I think that with over-exertion he will have aggravation. I think he will probably end up having surgery on this wrist and an attempt made to remove this ganglion.

" ' * * *

" 'If removal of the ganglion is successful I think he will have some improvement. If it is not successful, or if it will recur, his condition will be the same. I think the stiffness of the wrist, whatever degree of limitation of motion he has, will be permanent, whether the ganglion is removed or not. I think if he did light work for a long period of time the tendency would be that he would feel pretty good, but when he went back to heavy work he would have some trouble in his wrist again.'

"And further the Doctor testified:

" 'Oh, I think the function of his right wrist has been limited and will be limited. If I was going to estimate the degree of permanent disability, I would estimate it at between fifteen and twenty per cent of the loss of the hand at the wrist.'

"The plaintiff, a forthright and fair witness, testified that his calculated loss of time as a result of the injury was 184 days representing a loss of about $2,300 in wages. As we have seen, this loss of time occurred after December 28, 1953, the day of his first visit to Dr. Gray. It is evident that after the injury he carried on his work with pain and discomfort and that he will continue to suffer pain in the performance of work involving the use of his wrist.

"At the time of the injury, June 28, 1953, plaintiff was 41 years of age and in sound health. He had been a

longshoreman for 5 years prior to his injury, June 28, 1953, and for 10 years before his experience as longshoreman, he had been a sailor in the Merchant Marine. The testimony does not disclose that he has had training qualifying him to earn his living other than by means of physical toil.

"From the cross-examination of plaintiff we learn that he earned as a longshoreman in the year 1952, $2,383.32; in 1953, $4,663.28; and in 1954, $2,988.32. His job opportunity was not as good in 1952 as it was in 1953 and subsequently. This he explained by pointing out as follows:

> " 'Well, first, the regular longshoremen get the first—the fully registered men on the basis of seniority get the first chance at the job. Any work left over comes to the temporary pool or the partially registered men.'

"Some of the differences in annual pay are explained by the increased job opportunity by being placed on the fully registered board and the layoff, due to the complained of injury, of 184 days, and the fact that due to a sprained ankle to was unable to work from September 18, 1954, until December 6, 1954.

"The method of ascertaining damages used by Chief Judge Leahy, District of Delaware, in Yates v. Dann, 124 F. Supp. 125 on 133, is applicable to the situation here. In his opinion the Judge stated:

> " '[1, 2] Where physical disability in a particular case is such it may extend for a period of time or permanently into the future, the method of ascertaining the measure of damages is by determining the loss of earning power rather than to meas-

ure future losses by referring to past losses. A man may have a physical disability which would justify him in accepting only limited employment with a corresponding lower rate of pay, but because of economic necessity a man may assume duties beyond his physical capacity in order to earn a higher rate of pay.

" 'This question was presented to the Supreme Court of Pennsylvania, in Bochar v. J. B. Martin Motors, 374 Pa. 240, at page 244, 97 A. 2d 813, at page 815: "The defendants contend that there was no evidence of impairment of earning power and that the fact that Bochar's wages were higher after the accident than before proves no deterioration of earning ability. A tort feasor is not entitled to a reduction in his financial responsibility because, through fortuitous circumstances or unusual application on the part of the injured person, his wages following the accident are as high or even higher than they were prior to the accident. Parity of wages may show lack of impairment of earning power if it confirms other physical data that the injured person has completely recovered from his injuries. Standing alone, however, parity of wages is inconclusive. The office worker, who loses a leg has obviously had his earning ability impaired even though he can still sit at a desk and punch a comptometer as vigorously as before. It is not the status of the immediate present which determines capacity for remunerative employment. When permanent injury is involved, the whole span of life must be considered. Has the economic horizon of the disabled person been shortened because of the injuries sustained as the result of the tort feasor's negligence? That is the test. And it is no answer to that test to say that there are just as many dollars in the

patient's pay envelope now as prior to his accident. The normal status of a healthy person is to progress, and to the extent that his progress has been curtailed, he has suffered a loss which is properly computable in damages." (Emphasis added.)'

"William Patterson, a witness called on behalf of the defendant, testified that on June 28, 1953, he was aboard the vessel Golden Gate as head stevedore foreman. After such testimony, the following colloquy occurred:

" 'The Court: I would like to ask a question at this point. The gentleman testified he was employed by Grace Line Steamship. Is that the same company mentioned in paragraph IV of the complaint, the W. R. Grace Company?

" 'The Witness: They are agents for them.

" 'The Court: The point is, if there is any variance I want to know if there is going to be any point made of it.

" 'Mr. Holland (Attorney for Defendant): Perhaps I could explain and counsel can correct me if I am not correct. I think W. R. Grace & Company does stevedoring operation and they were the stevedoring contractor for this particular job and were in effect the plaintiff's employer. I think at the same time they also act in another capacity as local agent for the Johnson Line, which is a foreign corporation and therefore acted as agent and stevedoring contractor.

" 'The Court: If there was technically any variance, you make no point of that.

" 'Mr. Holland: There is no point of that, your Honor.'

"The above constitutes an admission that as an independent contractor, the W. R. Grace Company hired

the plaintiff, Shaun Maloney, as a stevedore and entered upon the performance of said contract and the plaintiff, at all times mentioned in the complaint, acted under the orders of the W. R. Grace Company, in its capacity as an independent contractor or employer, and not as an agent of said vessel and its said owners and operators.

"From a consideration of all the evidence, plaintiff's injuries were proximately caused by the negligence of the defendant without any contributory negligence on the part of the plaintiff.

"The Court makes its Findings of Fact and Conclusions of Law as follows:

"Findings of Fact

"1. The facts recited in the discussion above are hereby adopted as the Court's Finding No. 1.

"2. That at all times mentioned in plaintiff's complaint, he was and is now a resident of Seattle, King County, Washington, in the Western District of Washington, Northern Division.

"3. That at all times mentioned in the complaint, Johnson Line, a corporation, was a foreign corporation doing business in Seattle, King County, Washington, and the owner and operator of the steamship Golden Gate, which vessel was employed as a merchant vessel in navigable waters at Seattle, Washington.

"4. That prior to the 28th day of June, 1953, the defendant entered into a contract with the W. R. Grace Company, said company agreeing to act, and acting at all times mentioned in the complaint as an independent contractor, having complete control and supervision

of all operations pertaining to the loading and discharge of cargo from said vessel Golden Gate in the Port of Seattle, in the navigable waters of Puget Sound, Seattle, Washington.

"5. That as an independent contractor, said W. R. Grace Company hired the plaintiff, Shaun Maloney, as a stevedore and entered upon the performance of said contract, and the plaintiff, at all times mentioned in the complaint, acted under the orders of the said W. R. Grace Company in its capacity as an independent contractor or employer, and not as an agent of said vessel and its said owners and operators.

"6. That plaintiff, pursuant to §933 of Title 33 U.S.C.A., has elected to recover damages against a third person other than his employer, viz., the said defendant, and plaintiff has notified the Commissioner of this District, administering the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§901 et seq., of said election.

"7. That on or about the 28th day of June, 1953, at about the hour of 8:30 a.m., plaintiff was obliged, in the course of his employment, to descend to the 'tween-deck of No. 7 hatch of the said vessel Golden Gate. That he and other stevedores were instructed by their foreman to uncover the hatch and go in 'tween-deck and discharge the cargo in the lockers and wings. That plaintiff was the first of the group to descend and the descent was made by means of a steel ladder. That after taking a step or two, after his descent, plaintiff slipped and in trying to maintain his balance, extended his right hand

and suddenly and violently fell to the surface of the said 'tween-deck in such a manner as to cause the weight of his fall to be borne on the ends of his fingers and the forepart of his hand, and that as a result of said fall, plaintiff sustained severe and permanent injuries to his right wrist and that by reason of said injuries, he has been permanently disabled in the exercise of his occupation as a longshoreman, and has lost wages and will continue to lose wages. That by reason of said injuries, he has been caused to suffer great pain and will continue to suffer great pain in the future and may be obliged to submit to surgical treatment.

"That prior to the time of receiving said injuries, plaintiff was an able-bodied man of the age of 41 years and had a life expectancy of 28.43 years.

"8. That wheat was loaded on the vessel Golden Gate at Tacoma, Washington, prior to the time she arrived in Seattle on June 28, 1953, and that the presence of wheat dust and wheat kernels on the surface of the 'tween-deck where plaintiff sustained his injuries was known or should have been known to the defendant, its officers, agents or employees.

"9. That plaintiff's said fall and injuries resulting therefrom were due to the negligence and carelessness of the defendant in failing to provide plaintiff with a safe place in which to work in that the surface of the 'tween-deck was rendered slippery by the presence thereon of wheat dust and kernels of wheat causing plaintiff to slip and fall as aforesaid. That the presence there of such debris—wheat dust and wheat kernels—was unknown to the plaintiff prior to his said fall and

the slippery conditions of the said surface was due to the negligence and carelessness of the defendant.

"That plaintiff's fall and injuries resulting therefrom were occasioned solely by reason of the negligence of the defendant.

"That at all of said times the plaintiff exercised due caution and that no negligence on the part of the plaintiff contributed to his fall or the resulting injuries therefrom.

"10. That by reason of the hereinabove described injuries, pain and suffering, and of the impairment of plaintiff's ability to engage in his present occupation, plaintiff has been damaged as follows:

For past and future pain and suffering	$10,000
Loss of future earnings	10,000
Loss of earnings from time of accident to trial	2,300
Total	$22,300"

(R. 42):

"Order on Denying Motion for New Trial

"Defendant Johnson Line moves for a new trial upon the following grounds:

"1. Insufficiency of the evidence to support the amount of the damages awarded to the plaintiff, and that as a result thereof the judgment entered herein is excessive.

"2. Error in law at the trial in the failure of the court to apply the doctrine of transitory unseaworthiness, and under that doctrine, in failing to find that defendant did not have actual or constructive notice of the alleged unsafe condition of the vessel.

"This action was brought pursuant to Section 933 of Title 33, United States Code Annotated, and in an action pursuant to the same statute, The Wearpool, 112 Fed. (2) 245, 246, the Circuit Court of Appeals of the Fifth Circuit confirmed the findings of the Court below and stated:

> " 'It is elementary that it is the duty of a vessel to provide a reasonably safe place for longshoremen to work and reasonably safe means of access to the part of the ship in which they are to perform their duties. The evidence in the record supports the findings of facts by the District Judge and we concur in his conclusion as to the liability of the vessel * * * '

"Among the findings in this case are the following:

> " 'Finding 8. That wheat was loaded on the vessel Golden Gate at Tacoma, Washington, prior to the time she arrived in Seattle on June 28, 1953, and that the presence of wheat dust and wheat kernels on the surface of the 'tween-deck where plaintiff sustained his injuries was known or should have been known to the defendants, its officers, agents or employees.
>
> " 'Finding 9. The plaintiff's said fall and injuries resulting therefrom were due to the negligence and carelessness of the defendant in failing to provide plaintiff with a safe place in which to work in that the surface of the 'tween-deck was rendered slippery by the presence thereon of wheat dust and kernels of wheat causing plaintiff to slip and fall as aforesaid. That the presence there of such debris—wheat dust and wheat kernels—was unknown to the plaintiff prior to his said fall and the slippery condition of the said surface was due to the negligence and carelessness of the defendant.

"'That plaintiff's fall and injuries resulting therefrom were occasioned solely by reason of the negligence of the defendant.

"'That at all of said times the plaintiff exercised due caution and that no negligence on the part of the plaintiff contributed to his fall or the resulting injuries therefrom.'

"The above and other findings are amply supported by the evidence.

"Judge Hawley of the Nevada District, speaking for the Circuit Court of Appeals, Ninth Circuit, in The Joseph B. Thomas, 86 Fed. Rep. 658, 660, in a case where the relationship of the parties was identical to that here, stated:

"'What are the principles of law applicable to this case?

"'1. What duty did appellants owe to appellee? Their duty was to provide him a safe place in which to work, and to exercise ordinary and due diligence and care in keeping the premises reasonably secure against injury or danger. This is the pith and substance of all the decisions upon this subject as expressed in the great variety of cases, each having reference to the special facts and surroundings of the evidence relating thereto. * * * '

"In the recent case Lahde v. Soc. Armadora del Norte, a Corporation, 220 Fed. (2), 357, 361, the Court of Appeals of the Ninth Circuit reaffirmed the Thomas case, supra, in its holding that a ship owner has to invitee stevedores, as to its sailors, the duty to furnish a safe place to work, and that duty is non-delegable.

"The framers of the Complaint here commingled a claim for damages based upon negligence with a claim

based upon the alleged unseaworthiness of the vessel. These claims were not separately stated as in the complaint in Daniels v. Pacific-Atlantic Steamship Company, 120 F. Supp. 96 (D.C.E.D. N.Y.). The findings in the present case if not adequate on the question of unseaworthiness are sufficient as to negligence, and the effect given by this Court of such findings find support in Lahde v. Soc. Armadora del Norte, supra, and is Pope & Talbot v. Hawn, 346 U. S. 406, 413, where the Supreme Court of the United States held the plaintiff, not being a seaman, is not barred by the Osceola, 189 U. S. 158, from maintaining a negligence action against the shipowner, saying:

> " 'The fact that "Sieracki" upheld the right of workers like Hawn to recover for unseaworthiness does not justify the argument that the Court thereby blotted out their long recognized right to recover in admiralty for negligence.'

"Unlike the facts in Daniels v. Pacific-Atlantic Steamship Company, supra, there is evidence here that the wheat dust and wheat kernels were present on the surface of the 'tween-deck for a considerable length of time prior to the accident.

"The Court sees no merit in the contention that the amount of damages awarded is excessive.

"The Motion for New Trial is denied upon all the grounds urged." (R. 46)

QUESTION PRESENTED

Should this Court decide the facts differently than the trial court that heard and saw the witnesses?

ARGUMENT

A Court of Appeals Is Not Set Up to Weigh Facts. Its Function Is to Review Errors of Law.

The court below, in the person of an able and experienced trial judge, with due deliberation weighed all of the pertinent facts developed at the trial, the objections of the appellant were answered and findings were carefully prepared.

In essence, the court found two facts which have aggrieved appellant:

1. That appellant was negligent (R. 26, 46).
2. That appellee was damaged in the amount of $22,-300.00 (R. 27, 46).

This naturally brings up questions regarding the weight and conclusiveness to be accorded findings of fact by a trial court. This Court recently was called upon to review an award of damages in relation to their amount as in this present appeal. *Veelik v. Atchison, Topeka & Santa Fe Railway Co.,* 225 F.2d 53 (9th Cir.) The Court pointed out that a different amount:

> "might have been justified on the evidence."

But this Court refused to overturn the factual amount determined in the court below and went on to emphatically state:

> "Finally, this Court is set up to review errors of law."

Older cases from this Ninth Circuit have been equally emphatic. *Empire State-Idaho Min. & D. Co. v. Bunker Hill & S. Min. & C. Co.,* 114 Fed. 417 (9th Cir.):

> "Where a case is tried by the court without a

jury, its findings upon questions of fact are conclusive in the appellate court."

Ware v. Wunder Brewing Co. of San Francisco, et al., 160 Fed. 79 (9th Cir.):

"It is well settled that the appellate court cannot weigh the evidence, but must take the facts as found by the court below."

Even in admiralty appeals this Court no longer considers the fact of negligence as a proper subject for a *de novo* inquiry. *City of Long Beach v. American President Lines, Ltd.,* 223 F.2d 853 (9th Cir.):

"The first big issue is negligence. The ghost of trial *de novo* in this intermediate appellate court has been laid to rest with finality in *McAllister v. United States,* 348 U.S. 19, 75 S.Ct. 6."

So it is to be seen that the findings of fact of the trial court should not be disturbed unless there is no evidence at all to support them.

The Trial Court's Finding of Negligence Is Supported by the Evidence.

Appellant in its brief admits that appellee was furnished by the shipowner with an unsafe place to work. But it says that the evidence doesn't show that the shipowner had any notice of the unsafe condition, and therefore, the doctrine of transitory unseaworthiness should apply (Appellant's brief, page 14):

"The doctrine should have been applied by the lower court."

The brief of appellant defines transitory unseaworthiness as transitory unsafe conditions (Appellant's brief, page 4):

> "which render the particular area in question an unsafe place to work."

The trial court on the other hand expressly found that the presence of the unsafe condition was known or should have been known by appellant (R. 26, 46).

The appellee in his complaint (R. 5) charged both unseaworthiness and negligence, and in consequence, the trial court was free to find either or both on the part of the shipowner. *Pacific Far East Lines, Inc., v. Williams,* 234 F.2d 378 (9th Cir.):

> "The jury was not unwarranted in finding unseaworthiness or negligence or both, on the part of the shipowner."

As it turned out in the present case, the court found negligence and the appellant has found unseaworthiness. But appellant claims non-liability because the unseaworthiness was "transitory."

It is beyond dispute that an unsafe condition can be unseaworthiness and be the result of negligence at one and the same time. In such a situation it is unimportant upon which ground recovery is based insofar as a stevedore is concerned. If there is no longer any doctrine of transitory unseaworthiness, then the "unsafe condition" admitted by appellant becomes plain, ordinary unseaworthiness. In such event, the appellee is entitled to recover regardless of notice upon the part of the shipowner, because unseaworthinss is a species of liability not based on fault as is negligence. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872.

This poses the question as to whether there still is a doctrine of transitory unseaworthiness. Appellant has

cited in its brief, cases which allegedly follow the so-called *Cookingham* doctrine (*Cookingham v. United States,* 184 F.2d 213), in which the supposed doctrine of transitory unseaworthiness was evolved. None of such cases is cited which is later than the decision in *Poignant v. United States,* 225 F.2d 595 (July 22, 1955).

The Second Circuit absolutely repudiated the *Cookingham* doctrine in the *Poignant* case. The concurring opinion in referring to the *Cookingham* distinction said:

> "I think that distinction directly at odds with the Supreme Court's decision, I read my colleagues' opinion as repudiating it also."

The main body of the opinion went on to say:

> "We now come to the main problem of this case. Did the presence of an apple peel on the floor of a public corridor in the vessel constitute an unseaworthy condition, for the harmful effect of which the owner is absolutely liable to a member of the crew? As to this, there have been a number of cases involving transitory substances temporarily in the vessel and the cause of harm, in which it was held that there was no breach of the warranty of seaworthiness. *Cookingham v. United States,* 3 Cir. 184 F.2d 213; *Adamowski v. Gulf Oil Corp.,* D.C., 93 F.Supp. 115, affirmed 3 Cir., 197 F.2d 523; *Daniels v. Pacific-Atlantic S. S. Co.,* D.C. E.D. N.Y., 120 F.Supp. 96; *The Seeandbee,* 6 Cir., 102 F.2d 577.
>
> "The *Petterson* case (*Petterson v. Alaska S. S. Co.,* 9 Cir., 205 F.2d 478, 347 U.S. 396) later decided, makes it plain that the results reached in this line of cases cannot be justified by the mere fact that the existence of such a condition was not

> brought to the knowledge of the owner or that he lacked opportunity to prevent or correct the condition."

Our own Ninth Circuit Court of Appeals has recently said this about *Cookingham. Pacific Far East Lines v. Williams,* 234 F.2d 378 (9th Cir.):

> "Appellant, citing *Cookingham v. United States,* 3 Cir., 184 F.2d 213, argues that the presence of ice in the area or the slippery condition of the coaming was a 'transitory' condition, not constituting unseaworthiness or negligence on the part of the ship. Assuming the doubtful proposition that the Cookingham holding is recognized in this Circuit as persuasive authority, we see no analogy between it and the case before us. In Cookingham, the injured seaman, a cook, slipped on some 'jello' while going down a stairway. There was no evidence tending to connect the ship with the presence of the jello on the stairway."

It is not, however, important to the decision of this present cause to determine whether *"Cookingham"* still lives in the law. Because, there is ample evidence in the record to demonstrate that the appellants' liability can be supported by the negligence as found by the trial court.

The present case bears a striking similarity to *Palazzolo v. Pan-Atlantic S. S. Corp.,* 211 F.2d 277 (2d Cir.), which was affirmed in *Ryan Co. v. Pan-Atlantic Corp.,* 350 U.S. 124, 100 L.ed. 133, 76 S.Ct. 232. In the *Palazzolo* case the vessel was loaded in one port (Georgetown) by the same contracting stevedore company, which hired the plaintiff as a longshoreman when the vessel arrived in New York.

Likewise in the present case, the same contracting stevedore loaded the vessel in the Port of Tacoma (R. 91-93). When the ship arrived in Seattle, the appellee was hired as a longshoreman to go aboard her. He did not know where the vessel had come from except that (R. 59):

> "She had come from sea. I don't know what port."

In the *Palazzolo* case the longshoremen in the port of Georgetown presumably failed to properly shore-up cargo in one of the holds, before the hatch was covered for the voyage to New York. This was evidenced by the fact the cargo arrived improperly stowed in New York. In this case, the supercargo William Dibble testified that it was standard procedure for the stevedores to clean the deck in the No. 7 hold after loading in Tacoma. However, he testified that he didn't recollect seeing them do it on this occasion (R. 91). Here, as in the *Palazzolo* case, the court could readily find from the evidence that the stevedores had failed to clean the deck in Tacoma because when she arrived in Seattle the deck was in an unsafe condition.

Under these facts the court in the *Palazzolo* case held there was ample evidence to find against the ship on either or both negligence or unseaworthiness. The court said as follows:

> "Defendant-appellant, Pan-Atlantic, has argued that, since Ryan Stevedoring Company created the hazardous condition by improperly stowing the cargo in Georgetown, South Carolina, Pan-Atlantic should not be held liable to plaintiff. We cannot agree. Not only did defendant owe the duty to provide a seaworthy ship on which plaintiff-stevedore

might work, *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.ed. 1099, but it owed him, as a business visitor or invitee, the duty to provide a reasonably safe place to do his work. *Fodera v. Booth American Shipping Corp.,* 2 Cir., 159 F.2d 795. This duty was non-delegable. *Vanderlin v. Lorentzen,* 2 Cir., 139 F.2d 995, 997. Since it is reasonably foreseeable that improper stowage must result in rolls of pulp sliding or 'jumping' and striking someone, the ship would be liable for this accident if the jury found as it did here, that the accident resulted from improper stowage. *La Guerra v. Brasileiro,* 2 Cir., 124 F.2d 553. Proper stowage is an element of seaworthiness. *Pioneer Import Corp. v. The Lafcomo,* 2 Cir., 138 F.2d 907. There was ample evidence to support a jury verdict on either or both negligence or unseaworthiness. * * * (4) Nor does defendant's "surrender-of-control" argument compel a different result. Assuming *arguendo* defendant did surrender control of the Canton Victory to Ryan for loading in Georgetown, Pan-Atlantic reassumed control of the ship upon completion of the stowage operation, and operated it for some three or four days until its arrival in New York. At the time of discharge of cargo, the duty to the stevedore arose and Pan-Atlantic, in control of its ship, was obligated to provide the stevedore with a safe place to work and a seaworthy vessel."

This case also bears a similarity to *Lahde v. Soc. Armadora Del Norte, a corporation,* 220 F.2d 357, (9th Cir.). In the *Lahde* case, like the present case, the injury was caused by an unsafe condition on the 'tween deck which existed when the vessel came to port, and the injured longshoreman entered the hatch for the first

time. Here this Court held that it is immaterial whether the shipowner knew of the dangerous condition because when a stevedore is invited aboard a vessel, the shipowner owes him a non-delegable duty to provide him a safe place in which to work.

The record in this appeal shows that appellee was the first man to descend the ladder to the 'tween decks (R. 50, 61). The ladder covered a distance of about twenty feet between two decks (R. 77). In looking down from the top of the ladder, no evidence of any dangerous condition was apparent to appellee (R. 62, 78). In descending the ladder which was welded to the after-end of the hatch, the appellee was, of course, obliged to make use of his hands and feet. This required him to be in a position of facing the ladder during his descent (R. 61). After reaching the 'tween decks at the bottom of the twenty-foot ladder, the appellee turned and just as he took a bare step or two, he was caused to violently fall and injure himself by reason of an extremely slippery and hazardous condition of the deck caused by a thick coating of wheat dust in which there was a liberal scattering of wheat kernels (R. 51, 61). In fact, the deck was found to be in such a slippery and dangerous condition that the men were unable to work until it was cleaned up (R. 53, 61, 62, 63).

The injury to appellee was obviously caused solely and proximately by the dangerous and hazardous condition of the deck. The vessel was a foreign ship of Swedish ownership (R. 59). She had a crew aboard her (R. 60). The crew had the duty of keeping the ship's decks clean and safe for travel (R. 95). The ship had

been partly loaded in Tacoma prior to her arrival into Seattle (R. 91). The officers and crew of the vessel had the primary and non-delegable duty of seeing that the decks of the vessel were kept in a safe condition. They had ample opportunity to inspect the decks during and after the completion of the loading operations in the port of Tacoma. They had full control of the ship during its voyage to Seattle. They had ample opportunity to inspect the vessel's decks before inviting the stevedores aboard in the port of Seattle. If through their own negligence none of the ship's personnel actually saw the unsafe condition, they are surely charged with constructive notice of it, because, the record is plain that the ship's personnel had every opportunity to ascertain the dangerous and unsafe condition of the 'tween deck prior to the time appellee was injured upon it.

Additional cases in point are as follows:

States S. S. Co. v. Rothschild International Steve. Co., 205 F.2d 253 (9th Cir.):

> "The absolute duty of a shipowner to provide a safe place for longshoremen to work may be likened to the absolute duty of a landowner to keep his premises in such condition that passers-by are not injured."

Kreste v. United States, 158 F.2d 575:

> "1. That respondent was under a duty to provide libelant with a safe place to work. 2. That respondent violated its duty in that it neglected and carelessly caused, allowed and permitted oil and grease to collect upon the deck of said vessel."

The Joshua W. Rhodes, 259 Fed. 604:

"The contractor was not informed of the danger of flaxseed scattered on the deck, and hence was not responsible for its condition at the time of the accident, the duty of furnishing a reasonably safe place in which to work resting upon the steamship alone. In establishing responsibility for the injury, the question to be decided is whether, in leaving scattered flaxseed on her deck, the steamship complied with her duty to libelant to furnish a proper and reasonably safe passway for his use in the performance of his work * * *. Even a small quantity of flaxseed lying on a steel deck concededly makes the deck slippery and dangerous; one witness testifying that it would make it as slippery as though covered with ice. * * * Failure to clean up the deck, knowing there was flaxseed upon it rendered the vessel liable. Libelant did not see the patch of flaxseed upon which he slipped until nearly a foot from it, and even though he would not have stepped on it had he sooner perceived it, he cannot be held negligent for not stepping aside more quickly."

Munson S. S. Lines v. Newman, 24 F.2d 417:

"It is the duty of the ship initially to exercise due diligence to furnish the stevedore with a safe place to work, and she cannot escape liability by showing that a competent stevedore was employed at the loading port when the accident occurs in unloading."

Mollica v. Chilean Line, 107 F.Supp. 316:

"If, as the jury must be taken to have found, control over the hold vested in the ship immediately prior to the time plaintiff came to work, then he was entitled, under the warranty of seaworthiness, to commence work in a hold that was safe."

Mollica v. Compania Sud-American De Vapores, 202 F.2d 25:

> "Since *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.ed. 1099, the duty of a shipowner to provide an initially seaworthy ship cannot be questioned."

The Findings of the Trial Court on Damages Are Supported by the Evidence.

The ascertainment of the degree of injury and the assessment of damages is a function peculiarly in the province of the trier of the facts. Here the trial judge had the opportunity of personally seeing the appellee and hearing his testimony and the testimony of the other witnesses. In such cases, the result should be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by the law to ascertain what is just compensation for the injuries inflicted. This rule was announced in the *City of Panama,* 101 U.S. 453, 464, 25 L.ed. 1061:

> "When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted."

The court below in the case now before this Honorable Court, gave particular attention to the subject of injury and damages and discussed them with great thoroughness (R. 16 to 22). Instead of acting in a manner "to shock the conscience" as alleged by the appellant, the

trial judge conducted himself as did the district judge described in *United States v. Puscedu,* 224 F.2d 5:

> "The district judge fully realized the difficult and delicate nature of the problem he was confronted with, to make libellant as nearly whole as a just and fair financial award could do it. He conscientiously assumed and painstakingly discharged his burden, and in a carefully considered opinion, canvassing all the relevant considerations, making all due allowances for conflicting points of view, and giving his reasons for doing so, determined what a fair award should be."

The appellant has attempted to make a play upon the earnings of the appellee. Appellant's conflicting points of view were adequately answered by the trial judge by his Opinion (R. 20), in which the court pointed out that at the time of the injury, appellee was only an extra longshoreman and that he was later advanced to the fully registered board where his job opportunities increased. The record clearly shows appellee by reason of his injury, has been greatly handicapped in earning a livelihood in that his injuries prevent him from earning as much as the other longshoremen (R. 37, 39, 40, 74, 75) and that he has lost the wages stated.

No two cases of personal injury are exactly alike in respect to the damage that they cause to the individual. It is, therefore, futile to cite awards in other cases. The assessment of damages is not a matter of mechanical computation. It is matter solely within the broad understanding of the trier of the facts. In the *Puscedu* case *supra,* the court admonished against

> "treating the admeasurement of damages as a more or less mechanical matter, rather than as it is, a

matter requiring a broad understanding and the exercise of informed judgment."

There is further, no fixed standard to measure compensation for pain and suffering. This likewise is a matter that should be left to the trial judge who heard and saw the injured party. As this Court said in *United States v. Luehr,* 208 F.2d 138 (9th Cir.):

> "Such computations necessarily involves a high degree of speculation, but there are aspects of the situation on which one need not speculate. The court judicially knows that the value of the dollar continues to decline and that wages, including the wages of longshoremen, steadily pursue their ascending spiral. * * * We know of no standard by which to measure compensation for pain and suffering. On the whole we are not persuaded that the trial court's award is excessive."

Positive medical testimony was given by Dr. Bernard A. Gray, orthopedic specialist and member of the staff of the University of Washington Medical School (R. 66), in reference to the condition of appellee. He said:

1. Pain on forced motion of wrist (R. 69).
2. Pain in lifting (R. 68).
3. Pain on any exertion (R. 68).
4. That this condition is stationary (R. 69).
5. Limitation of range of motion (R. 69).
6. That the stiffness of the wrist is permanent (R. 69).
7. Constant swelling in the wrist (R. 68).
8. Lump on back of wrist which could be made to enlarge by bending the hand down (R. 69).

9. Increased exertion causing wrist to swell because irritation creates fluid (R. 70).
10. Heavy work causes increase of trouble (R. 70).
11. That exertion will cause an aggravation necessitating surgery (R. 69).
12. That the function of the right wrist has been permanently limited (R. 71).
13. That surgery cannot fully restore use (R. 69).
14. Permanent disability between 15 and 20 per cent as compared with amputation of the right hand (R. 71).

Appellee makes his living with his hands. He is trained for no other gainful work except that of the hard and arduous exertion of lifting cargo, and hauling on lines in his occupation of stevedore and seaman. The most useful tool in the accomplishment of his life's work—his own right arm, has been permanently impaired in its usefulness. The record has shown that he is frequently obliged to refrain from work because of the increased disability which follows the exertion necessary to his trade and calling. This condition is permanent. Pain is his constant companion for the rest of his natural life.

There is adequate evidence in the records to support the findings of fact by the trial judge in respect to damages. The rule of adhering to findings of fact in respect to damages by a trial judge should be followed when supported by evidence. If the rule were otherwise, the awards of trial courts would be advisory only and the ultimate responsibility of fixing damages would vest in the appeal tribunals.

CONCLUSION

Appellee respectfully submits that the trial judge made careful findings of fact based upon substantial evidence, and asks that the decree and judgment of the court below be affirmed.

Respectfully submitted,

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